Supreme Court, U.S.
FILED

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1996

JANICE L. MATTOX AND JERRY S. MATTOX,
Plaintiffs-Appellants,

versus

BOARD OF ADJUSTMENT OF THE
CITY OF DALLAS,
Defendant-Appellee.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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30pp

QUESTIONS PRESENTED

1. Whether, when applying principles of state law to the matters before it, the Federal Court of Appeals may reject the law as established by the intermediate state law courts, and prescribe its preferred interpretation.

2. Whether the Fifth Circuit Court of Appeals erred in holding that the interpretation of the Dallas Development Code, as established by the Texas intermediate courts, should not be followed, and in prescribing its own interpretation of the code.

PARTIES TO THE PROCEEDING

All of the parties in the United States Court of Appeals for the Fifth Circuit are listed in the caption.

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1996

JANICE L. MATTOX AND JERRY S. MATTOX,
PETITIONERS

versus

BOARD OF ADJUSTMENT OF THE CITY OF
DALLAS, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners herein respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this action on October 4, 1996.

1.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*) is not reported. The District Court's opinion and judgment are not reported.

2.

BASIS FOR JURISDICTION

The judgment of the Court of Appeals was entered on October 4, 1996. A timely petition for rehearing was denied on October 29, 1996. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

3.

ORDINANCE PROVISION INVOLVED

Dallas Development Code, Section 51A-4.704:

> "Any person may request that the Board establish a termination date for a nonconforming use. Upon receiving such a request, the Board shall provide a termination date for the nonconforming use under a plan whereby the owner's actual investment in the structure(s) prior to the time that the use became nonconforming can be amortized within a definite time period. The following factors must be considered by the board in determining a reasonable amortization period;
>
> (A) The owner's capital investment in the structures on the property at the time the use became nonconforming.
>
> ...."

STATEMENT OF THE CASE

The petitioners are the owners of a car wash, which when purchased, was considered a nonconforming use under the City of Dallas zoning ordinances. Under the Dallas Development Code, a nonconforming use is a legal use of property which may be continued until terminated, as provided for in the Dallas Development Code.

An application to terminate the nonconforming use was filed, and a hearing was held before the Dallas Board of Adjustment, to determine a termination date for the nonconforming use of the property. The petitioners challenged the Board's determination by filing suit in a Texas state district court. The Board removed the case to the federal court for the Northern District of Texas, where

trial was before the court without a jury. The trial court and the court of appeals affirmed the decision of the Board of Adjustment.

Under the Dallas Development Code, as interpreted by Texas courts, the petitioners are entitled to amortize any investment made by the previous owner which was made prior to the use becoming nonconforming. Thus, petitioners allege that in this instance the Board of Adjustment abused its discretion by failing to hear evidence of the prior owner's investment.

Petitioners contend that the court of appeals rejected the established Texas law which interpreted application of the Dallas Development Code. By rejecting the law established by the Texas intermediate courts, and inserting its own interpretation of state law, the

court of appeals erroneously affirmed the decision of the Board of Adjustment.

REASONS FOR GRANTING THE WRIT

The facts of this case illustrate a misapplication of this Court's opinions in *West v AT&T*, 311 U.S. 233 (1940), *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) and other cases, and present an opportunity for the Court to correct and clarify the Court of Appeal's ability to reject the determinations of intermediate state courts, when applying state law.

1. **THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE IMPORTANT QUESTION OF WHETHER, AND TO WHAT EXTENT, THE FEDERAL COURTS OF APPEALS MAY REJECT OR IGNORE THE DECISIONS OF INTERMEDIATE STATE COURTS WHEN APPLYING STATE LAW.**

On previous occasions, this Court has held that when a federal court must apply state law to the proceedings before it, the federal court has a duty to "ascertain and apply that law even though it has not been expounded by the highest court of the state." *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 177 (1940); referring to *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202 (1938).

This court established the principle that:

> "An intermediate state court in declaring and applying the state law is acting as an organ of the state and its determination, in the absence of more convincing evidence of what the state law is, should be followed by a federal court in deciding a state question."

Id., at 177-78. In *Fidelity Union*, this Court held that the lower court was not at liberty to determine the state law

question on its own reasoning, independent of the construction given the law by the intermediate courts. *Id.*

The Court expressly affirmed its holding in *Fidelity Union* when it reiterated this rule in *West v. AT&T*, 311 U.S. 223 (1940). There, the Court held that a "federal court is not free to reject the state rule merely because it has not acquired the sanction of the highest state court." at 236-37. The court concluded that a federal court is not free to apply its own interpretation even if it desires to do so, and even if it believes the state Supreme Court may establish a different interpretation in the future. *Id.*, at 238.

Finally, this Court has confirmed that when a state's highest court denies review of particular intermediate court

cases, the federal courts are not free to overturn the intermediate state courts' conclusions of state law, and must follow the intermediate courts' interpretation. *Hicks v. Feiock*, 485 U.S. 624, 630 (1988).

In the case at bar, the court of appeals admitted that two Texas intermediate courts had interpreted the law in a manner consistent with the petitioner's reading. The two determinations represented the sole explorations of the applicable facts and law, and were both denied review by the Texas Supreme Court.

Despite this acknowledgment of the current interpretive status, the court below conducted its own evaluation of the applicable law and rejected use of the Texas intermediate courts'

determinations. To justify this rejection of established state law, the court blindly offered its speculation that the Texas Supreme Court would disagree with the current holdings. The court below then proceeded to perform its own evaluation of the Dallas Development Code.

While the lower court acknowledged that they sat as an *Erie*[1] court, the decision of the court essentially renders the *Erie* doctrine meaningless. Clearly, this Court's long standing *Erie* doctrine dictates that the court of appeals apply the substantive law of the state. *Id.*, at 78. However, the Fifth Circuit court's actions in this case amount to a complete rejection of the established law

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[1] *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938)

of the state of Texas in contradiction with this Court's instructions.

Thus, this Court is faced with the important task of declaring the proper application of state law by the courts of appeals, and should grant the requested writ of certiorari in order to firmly establish that the lower courts are not at liberty to reject established state law in favor of their own interpretations.

2. **THE COURT OF APPEALS DECISION IS IN CONFLICT WITH THE PREVIOUS OPINIONS OF THIS COURT AND THE COURT ERRONEOUSLY REJECTED ESTABLISHED STATE LAW WHILE PERFORMING ITS OWN INTERPRETIVE ANALYSIS.**

The Court of Appeal's decision to ignore the established law of intermediate state courts is in conflict with the opinions articulated by this

Court, and is in contradiction to its duties in applying state law.

The court below acknowledged that on at least two occasions the Texas Courts of Appeals had applied the relevant portion of the Dallas Development Code to a situation identical to the one before the court. On both occasions the intermediate Texas courts held that under the Dallas Development Code a current property owner was entitled to amortize the remainder of the original owner's investment in the property at the time of nonconformity. *See, Board of Adjustment of Dallas v. Patel*, 882 S.W.2d 87 (Tex.App.--Amarillo 1994, writ denied); *Board of Adjustment of Dallas v Patel*, 887 S.W.2d 90 (Tex.App.--Texarkana 1994, writ denied). In both cases, the Supreme Court of Texas declined review of the holdings, by denying the Board's writ.

Despite this clear establishment of Texas law, the court below articulated a belief that the Texas Supreme Court would not have agreed with the aforementioned cases, and subsequently rejected the intermediate courts' holdings. (Appendix A, at a-8)

In doing so, the court below seemingly ignored this Court's holdings in *Fidelity Union* and *West*, where it was clearly stated that:

> " a federal court is not free to reject state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule is unsound in principle or that another is preferable." Id., at 236-37.

This Court in *West* went on to state that it is the duty of federal courts to:

> "ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may

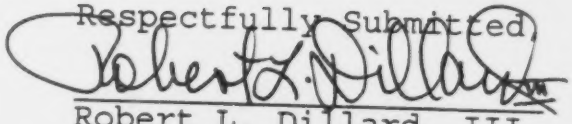
> appear from the viewpoint of general law" *Id.*, at 237

There is little doubt that the court of appeals illustrated discomfort with the determinations of the Texas courts, and simply chose to apply a different interpretation. The basis of the court's rejection of state law was not rooted in any data that the Texas Supreme Court would have held otherwise, and represents an illogical, self-created interpretation of Texas law. This was done in conflict with this Court's holdings, and in conflict with Texas law.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully Submitted,



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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 96-10116

JANICE L. MATTOX AND JERRY S. MATTOX
Plaintiffs-Appellants,

versus

BOARD OF ADJUSTMENT OF THE
CITY OF DALLAS,
Defendant-Appellee.

Appeal from the U.S. District Court
for the Northern District of Texas
(3:93-CV-1043)

Before DAVIS, EMILIO M. GARZA and

STEWART, Circuit Judges.

PER CURIAM:[2]

Plaintiffs Janice and Jerry Mattox appeals the district court's judgment affirming the decision of the Dallas Zoning Board of Adjustment (the "Board"). We affirm.

I.

Plaintiffs are the owners of a coin-operated car wash located in the city of Dallas, Texas. At the time they acquired the property, the car wash was a nonconforming use under relevant city ordinances. At a public hearing, the Board determined a termination date for Plaintiffs' nonconforming use of the property. The Plaintiffs challenged the Board's decision in an action filed in Texas state court. The case was

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[2] Pursuant to Local Rule 47.5, the Court has determined that this opinion should not be published and is not precedent except under the

subsequently removed to federal district court under 28 U.S.C. §§ 1441, 1331. The district court had jurisdiction over Plaintiffs supplemental state law claims under 28 U.S.C. § 1367. Following a bench trial, the district court entered findings of fact and conclusions of law, and entered judgment in favor of the Board on all claims. Plaintiffs filed a timely notice of appeal.

II.

Plaintiffs argue that the district court erred in upholding the Board's determination. Under state law, a plaintiff has the burden of showing that the board of adjustment's decision is illegal or an abuse of discretion. *Board of Adjustment v. Winkles*, 832 S.W.2d 803, 806 (Tex.App.--Dallas 1992, writ denied).

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limited circumstances set forth in Local Rule 47.5.4.

The test for abuse of discretion is whether the board of adjustment acted arbitrarily, unreasonably, or without reference to any guiding legal principals. *Board of Adjustment of Dallas v. Patel*, 882 S.W.2d 87, 89 (Tex.App.--Amarillo 1994, writ denied).

A municipality's power to terminate existing property uses rendered nonconforming under zoning ordinances is a valid exercise of the police power. *City of University Park v. Benners*, 485 S.W.2d 773, 777-78 (Tex. 1972). Under the "amortization" technique used to determine the appropriate termination date, the property owner should be permitted a reasonable opportunity to recoup his investment in the structure at the time of the zoning change. *Id.* at 778-79. Section 51A-4.704(a)(1) of the

Dallas Development Code provides in relevant part:

> Any person may request that the board establish a termination date for a nonconforming use. Upon receiving such a request, the board shall provide a termination date for the nonconforming use under a plan whereby the owner's actual investment in the structure(s) prior to the time that the use became nonconforming can be amortized within a definite time period. The following factors must be considered by the board in determining a reasonable amortization period;
>
> (A) The owner's capital investment in the structures on the property at the time the use became nonconforming.

Dallas Development Code, § 51A-4.704(a)(1) (emphasis added).

Plaintiffs contend that, in accordance with this provision, the Board was required to consider evidence of capital investments made by the previous owner prior to the nonconformity. In

other words, Plaintiffs claim that they, as current owners, are entitled to amortize the "innocent" investments of the individual who owned the property at the time the use became nonconforming. Their argument rests primarily on two Texas Court of Appeals cases. *See Board of Adjustment of Dallas v. Patel*, 882 S.W.2d 87, 89 (Tex.App.--Amarillo, writ denied) (holding that "the current owner is entitled to amortize the remainder of the original owner's investment in the property at the time of nonconformity"); *followed by Board of Adjustment of Dallas v. Patel*, 887 S.W.2d 90, 93 (Tex.App.--Texarkana 1994, writ denied).

Because this state law claim was before the district court under its pendant jurisdiction, the court appropriately applied Texas law. *Willis*

v. Roche Biomedical Lab., Inc., 61 F.3d 313, 314 (5th Cir. 1995). We review *de novo* the district court's determination of state law. *Id.* at 315. Sitting as an *Erie* court,[3] we are bound to apply the substantive law of the state "as interpreted by the state's highest court." *Texas Dep. of Housing & Community Affairs v. Verex Assurance, Inc.*, 68 F.3d 922, 928 (5th Cir. 1995) (internal quotation marks omitted). However, the opinion of an intermediate state law court "is datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would

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[3] Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).

decide otherwise." *West v. American Tel. & Tel. Co.*, 311 U.S. 233, 237, 61 S.Ct. 179, 183, 85 L.Ed. 139 (1940).

Upon careful consideration, we do not believe that the Texas Supreme Court would agree with the holdings in the *Patel* cases that the current owner is entitled to amortize the original owner's investments in the property's structure.[4] The only logical and reasonable reading of §51A-4.704(a)(1) is that "owner" refers to the owner then before the Board, that is, the current owner of the property. Amortization is intended to compensate the owner whose use of the property *becomes* nonconforming because of a zoning change, by allowing him a

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[4] We note that neither case provides any reasoning to support their interpretation of § 51A-4.704(a)(1).

reasonable time to recoup his investment in the structures on the property. The *Patel* courts would allow an owner who purchased the property with constructive or actual notice of its nonconforming use to benefit from the prior owner's investment in the property before it became nonconforming. The owner who purchases a nonconforming property is in no different a position than someone who invests in a nonconforming use after the zoning change. *See Neighborhood Comm. on Lead Pollution v. Board of Adjustment of the City of Dallas*, 728 S.W.2d 64, 70 (Tex.App.--Dallas, writ. ref'd n.r.e.)(holding that there is no right to amortize investments in the nonconforming use made after the zoning change); *City of Garland v. Valley Oil Co.*, 482 S.W.2d

342, 346 (Tex.Civ.App.--Dallas 1972, writ ref'd n.r.e.)(holding that plaintiff was not allowed to amortize the $20,000 paid for the land where it was bought after the zoning change, and stating that an "additional investment in a nonconforming use cannot extend the period of amortization"), cert. *denied*, 411 U.S. 933, 93 S.Ct. 1902, 36 L.Ed. 2d 392 (1973).

In this case, Plaintiffs purchased the property after its use had become nonconforming. Accordingly, we agree with the district court's determination that the Board was not required to consider evidence of the previous owner's investments in the property prior to its nonconformity for purposes of determining an appropriate amortization period.

III.

For the foregoing reasons, we AFFIRM.

Supreme Court, U.S.
FILED

961334 JAN 23 1997

OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1996

JANICE L. MATTOX AND JERRY S. MATTOX,
Plaintiffs-Appellants,

versus

BOARD OF ADJUSTMENT OF THE
CITY OF DALLAS,
Defendant-Appellee.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

SUPPLEMENTAL APPENDIX

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Fifth Circuit
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April 14, 1993

CITY OF DALLAS

Janice Mattox
1110 Valencia
Dallas, Texas 75223

Re: BDA 92T-034
5003 Reiger Avenue

Dear Ms. Mattox:

The Board of Adjustment at its public hearing held on Tuesday, April 13, 1993 provided a compliance date of December 31, 1993 for the nonconforming car wash use currently being operated on the subject property. In accordance with the Board's instruction, the Building Official will revoke the current Certificate of Occupancy on December 31, 1993. This action was filed in the Board's office on April 14, 1993. Should you decide to appeal the Board's findings, you have 10 days to appeal to district court.

Should you have any further questions regarding the Board's action, please contact me at 670-4206.

Sincerely,

/s/Elias Martinez, AICP
Administrator, Board of Adjustment
Department of Planning and Development
1500 Marilla, Room 5BN
Dallas, Texas 75201

km/AL:3

c: Munger Place Historic Dist. Assoc.
P.O. Box 140524
Dallas, Texas 752124

Keith Jackson
4901 Victor St.
Dallas 75214

Gene Akard
Ramiro Lopez
File

Civil No. 3:93-CV-1043-H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JANICE L. MATTOX and JERRY S. MATTOX,
Plaintiffs-Appellants,

versus

BOARD OF ADJUSTMENTS OF THE
CITY OF DALLAS,
Defendant-Appellee.

JUDGMENT

This Judgment is entered pursuant to the Court's Findings of Fact and Conclusions of Law filed January 5, 1996.

IT IS ORDERED, ADJUDGED AND DECREED by the Court that the decision of the Dallas Zoning Board of Adjustment is **AFFIRMED**; that Plaintiffs take nothing by their suit against Defendant; and that

this case be, and it is hereby, **DISMISSED** on the merits at Plaintiffs' cost.

SIGNED this 5 day of January, 1996.

/s/ BAREFOOT SANDERS, Senior Judge
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

Civil No. 3:93-CV-1043-H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JANICE L. MATTOX and JERRY S. MATTOX,
Plaintiffs-Appellants,

versus

BOARD OF ADJUSTMENTS OF THE
CITY OF DALLAS,
Defendant-Appellee.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiffs Janice L. Mattox and Jerry S. Mattox ("the Mattoxes") own the relevant property. On April 13, 1993, the Dallas Zoning Board of Adjustment ("the Board") held a public hearing at which it set December 31, 1993, as the termination date for the nonconforming use of the property as a car wash. The Mattoxes seek review of the Board's

decision pursuant to Section 211.011 of the Texas Local Government Code. The Mattoxes contend that the Board abused its discretion under the Dallas Development Code. They contend that the Board acted in an illegal and arbitrary fashion in making the determination, and that the decision regarding the termination date was made without substantial evidence and in violation of their constitutional rights.

The case was tried before the Court without a jury on January 2, 1996. Upon consideration of the testimony and other evidence in this case, the Court makes the following findings of fact and conclusions of law. Any finding may be designated as a conclusion, and any conclusion may be designated as a finding.

I. Findings of fact

1. Plaintiffs became the owners of the relevant property by Deed dated November 1, 1985.

2. Plaintiffs' car wash, located at the intersection of Collett Avenue and Reiger Avenue, is legally described as Lot 1, City Block N/1431, Munger Place Addition, Section No. 2, an addition to the City of Dallas.

3. The Board, at its public hearing on April 13, 1993, voted unanimously to establish a termination date of December 31, 1993, for Plaintiffs'' nonconforming use located at Lot 1, City Block N/1431, Munger Place Addition, Section 2.

4. Plaintiffs' suit was brought to challenge the Board's decision pursuant to § 211.011 of the Local Government Code.

5. At the April 13, 1993 hearing, the Board had before it evidence to support

its determination with respect to the amount of the Mattoxes' investment in the nonconforming use.

6. At the April 13, 1993 hearing, the Board had before it evidence to support its determination that the Mattoxes could recoup their investment in the nonconforming use by December 31, 1993.

7. At the April 13, 1993 hearing, the Board had before it, by operation of law, notices of the ordinances involved, e.g. Ordinance 15820, 1978, creating Planned Development District 97 ("PD97"); Ordinance 16657, August 20, 1980, expanding PD 97; Ordinance 16658, August 20, 1980, authorizing a Historic Designation on property within PD 97; and Ordinance 18541, January 9, 1985, clarifying the "Collett Retail Lots."

8. Use of the Mattoxes' property as a car wash became nonconforming on January

9, 1985, pursuant to the enactment of Dallas City Ordinance 18541.

9. The relevant ordinances and PD 97 File, which provided notice of the nonconforming use of the property as a car wash, were available to the public at the time the Mattoxes purchased the property.

10. The car wash was still in operation as of January 2, 1996, the trial date.

II. Conclusions of law

1. The Court has jurisdiction of this case under 28 U.S.C. § 1331.

2. Venue is proper in the Northern District of Texas.

3. Plaintiffs purchased the car wash as an existing nonconforming use.

4. The Board has authority, pursuant to § 51A-3.102(c) (4) of the Dallas Development Code, to terminate a nonconforming use.

5. At a termination hearing, the "burden is on the Board and other interested parties to present evidence of the owner's investment in the nonconforming use as a basis for an administrative order of termination." Neighborhood Committee on Lead Pollution v. Board of Adjustment of the City of Dallas, 728 S.W.2d 64, 67 (Tex.App.--Dallas 1987, writ ref'd n.r.e.).

6. The standard of review of the Board's decision by this Court is abuse of discretion. Plaintiff has the burden of proving that the Board's decision was illegal and, to do so must present a very clear showing that the Board abused its discretion. Board of Adjustment of Dallas v. Patel, 887 S.W.2d 90 (Tex.App.--Amarillo 1994, writ denied); Board of Adjustment of Dallas v. Winkles, 832

S.W.2d 803, 806 (Tex.App.--Dallas 1992, writ denied).

7. The test for abuse of discretion is whether the Board acted arbitrarily, unreasonably, or without referenced to any guiding rules and principles. Patel, 882 S.W.2d at 89.

8. This Court may not substitute its discretion for that of the Board. Patel, 882 S.W.2d at 89.

9. The Board did not abuse its discretion in establishing a compliance date of December 31, 1993, for the nonconforming use described as Lot 1, City Block N/1431, Munger Place Addition, Section No.2, Dallas, Texas.

10. At the April 13, 1993 hearing, the Board had before it evidence to support its determination with respect to the amount of the Mattoxes' investment in the nonconforming use.

11. At the April 13, 1993 hearing, the Board had before it evidence to support its determination that the Mattoxes could recoup their investment in the nonconforming use by December 31, 1993.

12. In City of University Park v. Benners, 485 S.W.2d 773, 777-78 (Tex. 1972) the Supreme Court of Texas approved the amortization technique of terminating nonconforming uses and limited the tolerance period required for amortization of a nonconforming use to the time necessary for recoupment of the landowner's investment in the structure *at the time of the zoning change*. Id. (emphasis added); § 51A-4.704(a)(1) of Dallas Development Code.

13. The Texas Court of Appeals for the Fifth District, Dallas County, has consistently held that an investment in a nonconforming use that is made *after* the

zoning change is not innocent and thus is not entitled to protection or recognition. Neighborhood Committee on Lead Pollution v. Board of Adjustment of the City of Dallas, 728 S.W.2d 64, 70 (Tex.App.--Dallas 1987, writ ref'd n.r.e.); City of Garland v. Valley Oil, 482 S.W.2d 342, 346 (Tex.App.--Dallas 1972, writ ref'd n.r.e.), cert. denied, 411 U.S. 933 (1973). It follows that Plaintiffs were not entitled to protection of their nonconforming use.

14. In Patel, however, the court held that Dallas Development Code § 51A-4.704(a)(1) provides that the current owner may be entitled to amortize the remainder of the original owner's investment in the property at the time of the nonconformity. Patel, 882 S.W.2d at 89. The Patel court stated that one of the factors the Board must consider is

the "owner's investment in the structures on the property at the time the use became nonconforming." Id.

15. Section 51A-4.704(a)(1) reads, in relevant part:

> (a) Termination of nonconforming uses:
>
> (1) Any person may request that the board establish a termination date for a nonconforming use. Upon receiving such a request, the board shall provide a termination date for the nonconforming use under a plan whereby *the owner's actual investment in the structure(s) prior to the time that the use became nonconforming can be amortized* within a definite time period. The following factors must be considered by the board in determining a reasonable amortization period:
>
> (A) *The owner's capital investment in the structures on the property at the time the use became nonconforming.*

Dallas Development Code, § 51A-4.704(a)(1)(A) (emphasis added).

16. The Patel interpretation of § 51-4.704 is inapplicable here. First, in Patel, there was a major fact issue as to who owned the property at the time the use became nonconforming. Id. at 89. Here, it is clear the Mattoxes did not own the property until after the use became nonconforming. Second, in Patel, both the prior owner and the current owner appealed the decision. In the instant case, the Board did not know the identity of the owner at the time the use became nonconforming. Return[1] at 30.

17. The only logical and feasible reading of § 51A-4.704(a) is that "owner" refers to "owner before the Board for the termination hearing" or "current owner."

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[1] In seeking review of the Board's April 13, 1993 decision, Plaintiffs filed a petition for writ of certiorari. The "Certificate and Affidavit in Response to Writ of Certiorari" ("Return") was admitted as Plaintiffs' Exhibit 1 and was relied on by both parties at trial and in briefing.

Section 51A-4.704(a) serves as a guide to the Board during termination hearings. Unless the Board was faced with a Patel scenario -- where both the prior and the current owner appealed the determination, because it was unclear who owned the property at the time the use became nonconforming -- the owner before the Board for the termination hearing would necessarily be the current owner.

18. Section 51A-4.704(a) only provides for amortization of an "owner's actual investment in the structure(s) prior to the time that the use became nonconforming." The Mattoxes did not purchase the property prior to its use becoming nonconforming. Therefore, the Mattoxes had no investment in the structure prior to the time that the use became nonconforming. See also, Valley Oil, 482 S.W.2d at 346 ("An additional

investment in a nonconforming use cannot extend the period of amortization or otherwise restrict the city's police power. ... the owner of a nonconforming service station, who, with actual or constructive notice of a zoning ordinance, purchases an adjoining lot for the purpose of building a larger station, cannot complain of any hardship by denial of such extended use."). It follows that the Mattoxes were not even entitled to amortization.

19. The Mattoxes' rights to equal protection have not been violated. All nonconforming uses within the City of Dallas are subject to being called before the Board for a compliance hearing. The Mattoxes were not singled out for special treatment by the Board. See Patel, 887 S.W.2d at 94.

20. The Mattoxes were clearly afforded procedural due process in the proceedings before the Board. They received notice of the hearing through the subpoena duces tecum and subsequent rescheduling. (Return at 111-13, 152). They were present at the April 13, 1993 hearing. They were notified of the right to appeal the decision of the Board by letter dated April 14, 1993. (Return at 114). See Cedar Crest No. 10, Inc. v. City of Dallas, 754 S.W.2d 351, 352-353 (Tex.App.--Eastland 1988), cert. denied, 490 U.S. 1081 (1989).

21. The Board's setting of the termination date was not an unconstitutional taking. Rather, the procedure employed by the Board complied with the relevant ordinances and case law, and the Board had before it evidence to support its determination that the

Mattoxes could recoup their investment by December 31, 1993.

Accordingly, the Board's determination is **AFFIRMED**. Judgment shall be entered accordingly.

SO ORDERED.

DATED: January 5, 1996.

/s/ BAREFOOT SANDERS
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF TEXAS

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-10116

JANICE L. MATTOX; JERRY S MATTOX
Plaintiffs - Appellants

versus

DALLAS TX, CITY OF,
Board of Adjustment of the
Defendant - Appellee

Appeal from the United States District Court for the Northern District of Texas, Dallas

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ON PETITION FOR REHEARING

Before DAVIS, EMILIO M. GARZA and STEWART, Circuit Judges.

PER CURIAM:

IT IS ORDERED, that the petition for rehearing filed in the above case is **DENIED**.

ENTERED FOR THE COURT:

/s/Emilio M. Garza
United States Circuit Judge
REHG-2

The foregoing is the Supplemental Appendix to the Petitioners' Petition for Writ of Certiorari.

Respectfully Submitted,

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